



REVIEW REPORT 290-2021, 023-2022

Brightwater Senior Living

November 15, 2022

Summary:

The Applicant submitted an access to information request to Brightwater Senior Living (Brightwater). Initially, the Applicant did not receive a response from Brightwater. Therefore, the Applicant contacted my office to request a review. After contacting my office, Brightwater provided records to the Applicant. The Applicant was dissatisfied. They believed that there were missing information/records. Therefore, the Commissioner proceeded to conduct a review. The Commissioner found that Brightwater did not respond to the Applicant within the legislated timeline set out in section 36 of HIPA. However, the Commissioner found that Brightwater conducted a reasonable search for records. The Commissioner recommended that Brightwater amend its policies and procedures for responding to access requests. Specifically, he recommended that Brightwater should ensure it is responding to access requests within legislated timelines set out in sections 36 and 37 of *The Health Information Protection Act*.

I BACKGROUND

[1] On October 5, 2021, the Applicant submitted the following access to information request to Brightwater Senior Living (Brightwater):

I am seeking medical records regarding my deceased mother [Name], [health services number], born [date of birth].

Care Conference notes regarding care requirements and planned care

Require the Professional [sic] designation/Desipline [sic] and badge number for the following individuals.

[Name of individual 1]

[Name of individual 2]
[Name of individual 3]
[Name of individual 4]

- [2] On November 12, 2021, the Applicant contacted my office. The Applicant indicated they were unable to receive a response from Brightwater.
- [3] My office made efforts to contact Brightwater to establish who within the organization would be the appropriate contact.
- [4] On November 30, 2021, Brightwater informed my office that the Executive Director at Brightwater would be the staff member who would be the contact.
- [5] Also on November 30, 2021, my office forwarded the Applicant's access request to Brightwater's Executive Director (with the Applicant's consent).
- [6] On December 14, 2021, Brightwater indicated to my office that it (Brightwater) sent the responsive records to the Applicant. Brightwater's response to the Applicant did not include a letter required by section 36 of *The Health Information Protection Act* (HIPA).
- [7] On December 21, 2021, the Applicant informed my office that they believed the following were missing from the records:
- Notes from the "Resident Daily Log" for November 12th, 13th, 14th, 17th, and 20th, in their entirety.
 - Notes from the "Nursing Progress Notes" for November 9th, 10th, 12th, 15th, and 16th, in their entirety.
- [8] Brightwater sent a letter dated February 1, 2022 to the Applicant indicating that the Applicant's access request "has been fully granted".

[9] The Applicant indicated they still believed notes (as detailed earlier) were missing from the records. Further, the Applicant was dissatisfied with the time it took for Brightwater to respond to their access request.

[10] On February 3, 2022, my office notified both Brightwater and the Applicant that my office would be undertaking a review.

[11] On April 20, 2022, my office received a submission from Brightwater.

II RECORDS AT ISSUE

[12] At issue is whether Brightwater responded to the Applicant's access request within the legislated timelines set out in HIPA and whether Brightwater conducted a reasonable search for records. Therefore, there are no records at issue in this review.

III DISCUSSION OF THE ISSUES

1. Do I have jurisdiction?

[13] HIPA is engaged when three elements are present: 1) personal health information, 2) a trustee, and 3) the personal health information is in the custody or control of the trustee.

[14] First, the Applicant sought a copy of their deceased mother's medical records. Subsection 2(m)(i) of HIPA defines "personal health information" as follows:

2 In this Act:

...

(m) "**personal health information**" means, with respect to an individual, whether living or deceased:

(i) information with respect to the physical or mental health of the individual;

[15] Since a medical record would contain information regarding an individual's physical or mental health, I am satisfied that personal health information is present.

[16] Second, Brightwater qualifies as a “trustee” as defined by subsection 2(t)(iv) of HIPA, which provides:

2 In this Act:

...

(t) “trustee” means any of the following that have custody or control of personal health information:

...

(iv) a licensee as defined in *The Personal Care Homes Act*;

[17] I am satisfied that a trustee is present.

[18] Third, since the Applicant’s mother was a resident at Brightwater, I am satisfied that their personal health information is in the custody or control of Brightwater.

[19] All three elements are present. As such, I find that HIPA is engaged and that I have jurisdiction to undertake this review.

2. Did Brightwater respond within the legislated timelines?

[20] Subsection 36(1)(a) of HIPA requires that a trustee respond to an applicant within 30 days of receiving an access request. It says:

36(1) Within 30 days after receiving a written request for access, a trustee must respond to the request in one of the following ways:

(a) by making the personal health information available for examination and providing a copy, if requested, to the applicant;

[21] Section 2-28 of *The Legislation Act* provides guidance on how to calculate 30 days. Based on *The Legislation Act*, the following can be applied for calculating 30 days under FOIP:

2-28(3) A period described by reference to a number of days between two events excludes the day on which the first event happens and includes the day on which the second event happens.

...

2-28(5) A time limit for the doing of anything that falls or expires on a holiday is extended to include the next day that is not a holiday.

2-28(6) A time limit for registering or filing documents or for doing anything else that falls or expires on a day on which the place for doing so is not open during its regular hours of business is extended to include the next day the place is open during its regular hours of business.

[22] If certain circumstances exist, the trustee can extend the response time up to an additional 30 days. Those limited circumstances are listed in subsection 37(1) of HIPA. However, where a trustee is going to extend the response time, notice must be given to the applicant within the initial 30 days. Section 37 of HIPA provides:

37(1) A trustee may extend the period set out in subsection 36(1) for a reasonable period not exceeding 30 days where:

(a) the request is for access to a large number of records or necessitates a search through a large number of records or there is a large number of requests, and completing the work within the original period would unreasonably interfere with the operations of the trustee; or

(b) consultations that are necessary to comply with the request cannot reasonably be completed within the original period.

(2) A trustee who extends a period pursuant to subsection (1) shall give notice of the extension to the applicant within 30 days after the request is made.

[23] There was no indication that Brightwater provided a notice pursuant to subsection 37(2) of HIPA to the Applicant. Therefore, since Brightwater received the access request on October 5, 2021, then Brightwater should have responded by November 4, 2021. However, Brightwater did not send a copy of the records until December 14, 2021. In other words, Brightwater was 40 days late in responding to the Applicant's access request. As such, I find Brightwater did not respond within legislated timelines.

[24] I add that in its submission, Brightwater indicated that it did not, "give out this information to the applicant at the time of [their] access request as [they were] not listed as POA or any point of contact for the resident on our files."

[25] If the trustee believes that the individual does not have a right to access the requested personal health information, the trustee must still respond to the access request pursuant to section 36 of HIPA. Specifically, it could respond pursuant to subsection 36(1)(c) of HIPA which provides:

36(1) Within 30 days after receiving a written request for access, a trustee must respond to the request in one of the following ways:

...

(c) by refusing the written request for access, in whole or in part, and informing the applicant:

(i) of the refusal and the reasons for the refusal; and

(ii) of the applicant's right to request a review of the refusal pursuant to Part VI;

[26] In this case, Brightwater simply did not respond to the Applicant's access request. Section 36 of HIPA does not allow a trustee to ignore access requests on the basis of the trustee believing the Applicant does not have a right to access the personal health information. A trustee must respond, setting out its reasons for refusing access. As such, I recommend that Brightwater amend its policies and procedures for responding to access requests. Specifically, Brightwater should ensure it is responding to access requests within legislated timelines set out in sections 36 and 37 of HIPA.

3. Did Brightwater undertake a reasonable search for records?

[27] Subsection 35(1) of HIPA requires a trustee to respond to an applicant's access to information request openly, accurately and completely:

35(1) Subject to sections 36 to 38, a trustee shall respond to a written request for access openly, accurately and completely.

[28] This means that trustees should make reasonable efforts to not only identify and seek records responsive to an applicant's access to information request, but to explain the steps in the process. The threshold to be met is one of "reasonableness". In other words, it is not

a standard of perfection but rather what a fair and rational person would expect to be done or consider acceptable (*Guide to HIPA*, updated December 2016, p. 70).

[29] A reasonable search is one in which an employee, experienced in the subject matter of the records, expends a reasonable effort to locate records which are reasonably related to the access request. A reasonable effort is the level of effort you would expect of any fair, sensible person searching areas where records are likely to be stored. What is reasonable depends on the request and related circumstances.

[30] As noted in the background of this Report, the Applicant asserted that notes from the “Resident Daily Log” for November 12th, 13th, 14th, 17th, and 20th in their entirety were missing. Further, the Applicant believed notes from the “Nursing Program Notes” for November 9th, 10th, 12th, 15th, and 16th in their entirety were missing.

[31] In its submission, Brightwater explained that it maintains its electronic records in a system called Yardi. When it searches for records regarding a resident, it will simply input the date range all the records that were recorded for the resident will come up in the search results. It asserted that this applies to both the progress notes and the daily logs.

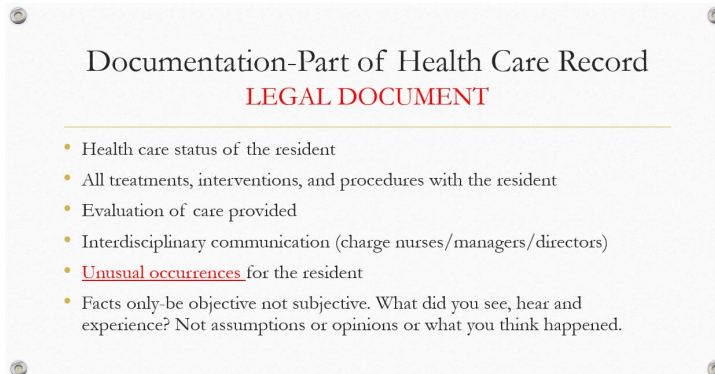
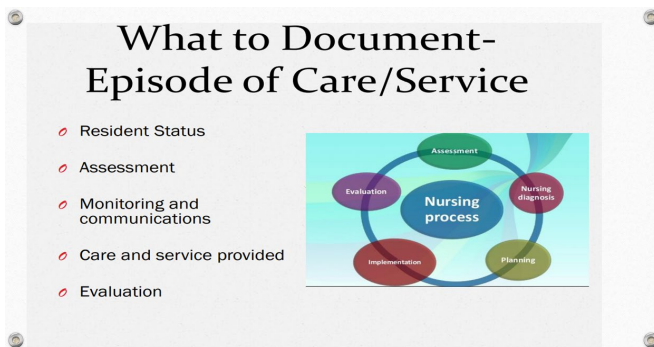
[32] In an email dated November 9, 2022, my office posed the following questions to Brightwater:

- Is it normal practice for staff to skip days in terms of making notes in the resident’s daily logs or nursing progress notes?
- Is there any possibility notes were recorded elsewhere (for example, a physical notebook)? Or are all notes recorded in the electronic system Yardi?
- Would you be able to provide any written policies and/or procedures that would guide staff in terms of making notes in the resident’s daily logs or nursing progress notes?

[33] Regarding the first question, Brightwater explained that its staff “Chart by exception”. It asserted that not everything is charted.

[34] Regarding the second question, Brightwater explained that all documentation is recorded in its electronic system Yardi.

[35] Regarding the third question, Brightwater provided a Microsoft PowerPoint presentation entitled “Documentation”. Based on a review, the PowerPoint appears to provide guidance to staff on what documentation is, what to document and how to document. Slides 4 and 5 of the PowerPoint presentation provides guidance on what to document as follows:



[36] The Applicant explained that their mother had been a resident from November 3, 2020 to November 26, 2020. The Applicant asserted the following:

There are 4 medical reporting shifts per day at Brightwater Living Nursing Home. The Medical records and data from Brightwater Senior Living show over the period of 23 days only 4 days are fully reported. There are 5 days where all 4 shifts are none existent and or not reported. They also under reported 5 other days by producing just 1 report of 4 possible reporting shifts per day, 5 days which they reported 2 of 4 shifts per day, and 4 Days in which they reported 3 times.

[37] Based on the above, the basis for the Applicant's belief that there are missing records/information is because the Applicant believes there should be documentation for every shift of each day from November 3, 2020 to November 26, 2020. However, based on the documentation guidance document, there is no expectation set upon staff to make any documentation on every shift.

[38] Further, based on a review of *The Personal Care Homes Act* and *The Personal Care Homes Regulations*, there is no requirement for staff of a personal care home to make notes on each shift. Specifically, section 10 of *The Personal Care Homes Regulations* sets out the requirements of a resident care record, and does not include that staff are required to make notes on every shift. If the Applicant has concerns regarding the lack of requirements for notes to be recorded on every shift, then they may raise this issue with the Minister of Health.

[39] My office's focus is on whether Brightwater had conducted a reasonable search for records. Based on the above, I find that Brightwater has conducted a reasonable search for records.

IV FINDINGS

[40] I find that I have jurisdiction to undertake this review.

[41] I find Brightwater did not respond within legislated timelines.

[42] I find that Brightwater has conducted a reasonable search for records.

V RECOMMENDATIONS

[43] I recommend that Brightwater amend its policies and procedures for responding to access requests. Specifically, Brightwater should ensure it is responding to access requests within legislated timelines set out in sections 36 and 37 of HIPA.

[44] I recommend that Brightwater take no further action regarding the search for records.

Dated at Regina, in the Province of Saskatchewan, this 15th day of November, 2022.

Ronald J. Kruzeniski, K.C.
Saskatchewan Information and Privacy
Commissioner